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No. _____

In The

Supreme Court of the United States

ROBERT TOCKES,

Petitioner,

vs.

AIR-LAND TRANSPORT SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In an ADA action, what additional evidence must be presented where there is direct evidence that an employer terminated an employee because it viewed the employee as "crippled", "handicapped" and "disabled"?

2. What substantive evidence must an employee present to create a reasonable inference to be considered "regarded as disabled" by their employer in an ADA action (42 U.S.C. §12102(c))?

PARTIES TO THE PROCEEDING

Robert Tockes and Air-Land Transport Services, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Tockes, respectfully requests that a writ of certiorari be issued to review the Judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit Court of Appeals selected its opinion for publication in the Federal Reporter. The decision is reported at 343 F.3d 895. The District Court did not publish an opinion in this case. Its order is reprinted in the Appendix (5-26).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered September 6, 2003. Jurisdiction is based upon a federal question. Petitioner filed suit against Respondent, alleging violations of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*

STATUTORY PROVISION

42 U.S.C. §12102(2).

STATEMENT OF THE CASE

There are two fundamental questions in this case. First, what evidence is necessary for an individual to be

"regarded as" disabled when there is direct evidence of disability discrimination? Second, what substantive evidence is needed to create a reasonable inference that an employer regarded an employee as disabled?

In January 1988, Petitioner suffered a crushing injury to his right hand while in the military. (App. 1). As a result he was awarded a 20% disability pension from the Army. (*Id.*) In January 2001, Petitioner applied for a job with Respondent as a truck driver (App. 2) and indicated on the application and income certification papers he was disabled. He was subsequently hired by Respondent. (App. 6). During the course of his brief employment with Air-Land, Tockes informed his employer he was "disabled," and had several conversations in which he discussed the injury to his hand and subsequent disability. (*Id.*)

In January 2001, Petitioner was injured after allegedly using one hand on a job while working for Respondent. (App. 7-9). When he returned to work on February 2, 2001 he was told he was being terminated, and that the termination was "partially" Respondent's fault for hiring a disabled person. The individual who terminated Petitioner stated he was "handicapped", "crippled" and "disabled." (App. 9).

Respondent's alleged basis for termination was a safety violation. However, Petitioner testified nothing was said regarding a safety violation when he was terminated (App. 2). Furthermore, a non-disabled employee committed multiple safety violations before being terminated.

The District Court granted Respondent's Motion for Summary Judgment on March 10, 2003, holding Respondent may have viewed Petitioner as physically impaired, but the evidence in the record was insufficient to show it

regarded him as being substantially limited in a major life activity. Jurisdiction was proper via 28 U.S.C. §1331.

The Seventh Circuit Court of Appeals, with jurisdiction vested by 28 U.S.C. §1291, upheld the District Court's decision on September 6, 2003, with the Clerk entering judgment the same day.

The Court of Appeals held that there were several interpretations of the term "crippled". The Court held that there was insufficient evidence to conclude that Respondent believed Petitioner had an impairment serious enough to warrant being "disabled" per the Americans with Disabilities Act.

The Court of Appeals also held that allowing the suit to go forward would discourage employers from hiring an individual with a partial disability.

This decision is inconsistent with the plain language of the statute as well as the relevant case law.

ARGUMENT

A. The Court of Appeals Decision fails to follow the Americans with Disabilities Act and the previous holding of the Supreme Court and other Courts of Appeals.

There are three ways for an individual to prove he or she is "disabled" under the ADA. (42 U.S.C. §12102(2)). One of the methods is to prove the employer regarded an employee as disabled. To determine whether an employer "regarded" an employee as disabled, it is often necessary to infer the actual belief of the employer. Unfortunately, the

Court of Appeals did not allow the jury to reasonably infer Respondent's intent, and in doing so may have created a precedent that contradicts the plain meaning of the statute.

Respondent referred to Petitioner as "crippled," "disabled," and "handicapped" when it terminated him. The term "crippled" has been defined as the loss of use of a limb.[1] Hence, applying the objective definition of the term it used, it should be assumed that Respondent regarded Petitioner as disabled.

As the Eighth Circuit recently held, the provision in the statute addressing perceived disabilities "is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarding as having disabilities." *EEOC v. Excel, Inc. f/k/a Excel Logistics, Inc.*, 208 F. Supp. 2d 1013, 1042 (8th Cir. 2002). Labeling an employee "crippled" is an extreme example of this archaic attitude, and is exactly the type of bigotry the ADA was designed to eliminate.

The Court avoided this result by holding there was insufficient evidence in the record that would lead Respondent to believe Petitioner was disabled as defined by

---

[1] In *Hoffman v. Caterpillar*, 256 F.3d 568, 573 (7th Cir. 2001) the Court found that a person with one functioning arm is disabled. There would be numerous major life activities implicated with lack of use of a hand, such as pushing, pulling, grasping, lifting, each of which would substantially limit an individual in a class of jobs. Furthermore, it is the perception of the employer, not the actual disability, at issue. Hence, if it can be inferred that the employer regarded the employee as disabled, summary judgment is improper.

the ADA. In doing so, the Court ignored the fact that Petitioner told Respondent prior to his firing:

1) he was a "disabled veteran";

2) he marked on his application he was "disabled";

3) he filled out an income certification paper indicating he was disabled; and

4) he had several conversations with supervisors/management of Airland in which he told them he was disabled. (App. 5-10).

In addition, Petitioner was fired after allegedly using one hand on a two handed job. (*Id.*)

A person is regarded as disabled within the meaning of the ADA if an employer mistakenly believes an impairment substantially limits one or more major life activities. *Murphy v. UPS*, 527 U.S. 516, 521-22 (1999).

Here, because Respondent regarded Petitioner as not having use of a limb, there are a broad class of jobs that it viewed Petitioner could not perform. Any job that entailed pushing, pulling, grasping with two hands, lifting and tying would be substantially limiting to an individual with the use of one arm. More specifically, it would prohibit an employee from working a class of jobs.

In *Murphy v. UPS*, the Supreme Court held that the termination of an employee was lawful because the employer did not have an "unsubstantiated" fear of the employee having a stroke or heart attack. (*Id.* at 520-21). The import is that if the respondent did harbor this unsubstantiated belief, it would violate the ADA. *Id.* Here,

the Respondent had an unsubstantiated belief Petitioner was "crippled".

The importance of this case is to clarify and identify what evidence is necessary to create an inference that an employer regarded an employee as disabled. It is also important because there exists direct evidence of discrimination (i.e., intent need not be inferred), which begs the question of what other evidence is necessary in a direct evidence case. See *Mustafa v. Clark County School*, 157 F.3d 1169, 1175-76 (9th Cir. 1998) (noting McDonnel Douglas test does not apply if the employee's disability is the basis for termination).

Respondent's statements were based upon negative stereotypes of people with perceived disabilities. Labeling an individual crippled and articulating it as a basis for termination is akin to using a religious or racial slur while terminating an employee; it is demeaning and constitutes direct evidence of illegal discrimination.

On another level, the Court can clearly set forth the types of inferences required to prove a "regarded as disabled" ADA case, and articulate what factual foundation is necessary to create a reasonable inference that an employer regarded an employee as disabled.

B. The standard used in Title VII should be used in Americans with Disability Act cases.

Undoubtedly, if Respondent had used a racial, religious, sexist or ageist slur as a basis for Petitioner's termination, summary judgment would be improper. The Petitioner prays that the same standard be applied in ADA cases. Both the ADA and Title VII of the Civil Rights Act

were created to eliminate certain discrimination in the workplace. The instant decision creates a non-existent distinction between the two statutes by creating a higher burden of proof.[2] If the ADA was designed to eliminate negative stereotypes in the workplace, it is unlikely one would find a more egregious example of such a stereotype than the instant case. Further, Respondent actually made the illegal consideration a basis for the decision to terminate Tockes.

If an employer bases a decision on unfounded stereotypes, and because the Americans with Disabilities Act discourages employment decisions based upon stereotypes and generalizations associated with the individual's disability rather than the individual characterization, the employer has violated the ADA. *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 573 (7th Cir. 2001). See also *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995). The instant decision ignores one of the basic tenents of the ADA by allowing Respondent to terminate an employee based upon an "unfounded stereotype."

Respondent described Petitioner as "crippled." The definition of crippled has been defined as "to deprive the use of a limb." (Websters New Collegiate Dictionary, 1987, p. 270). Accepting the objective definition of the term

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[2] Some scholars argue there has been a "backlash" by the Courts against employees in ADA actions. See Judicial Backlash, the ADA, and the Civil Rights Model, 21 Berkeley Journal Employment & Labor Law 19 (2000). (Noting that the ADA model has drifted apart from the Civil Rights Model that the ADA was based upon; noting the legislative findings of the ADA "draw on the concepts and rhetoric" of the Civil Rights Act; and noting the ADA draws upon the remedial and administrative scheme of the Civil Rights Act of 1964) *(Id.* at 23, 32).

crippled, it is reasonable to infer that Respondent believed Petitioner did not have the use of his limb. The plain meanings of the word Respondent used to describe Petitioner would indicate he was disabled per the ADA. The description is direct evidence of discrimination.

The Court of Appeals also made a fundamental error when it held that the term crippled had "several" definitions. (App. 3). This may be true generally, but is not true under Rule 56. Following Rule 56, all facts and inferences must be taken in the light most favorable to the non-moving party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000). Hence, the objective definition of the word crippled should have been applied by the Court to determine if Respondent "regarded" Petitioner as disabled per the ADA. Applying this definition, it follows that Respondent regarded Petitioner as disabled.

C. The proceeding involves a question of exceptional importance in that the result, if undisturbed, will allow employers to terminate employees based upon a perceived disability, and to harbor discriminatory stereotypes and articulate these biases as a basis for termination, without violating the ADA.

If *Tockes v. Air-Land Transportation* is upheld, it will create a precedent where an employer may terminate an employee because it regarded the individual as "crippled" "handicapped" and "disabled", simply by denying it had enough "facts" to lead it to conclude that the employee was substantially limited in a major life activity. On the broader level, it would allow an employer to harbor discriminating attitudes towards individuals it regards as "disabled" or "crippled" because the employer would be

protected by a hypersensitive inquiry by the Court as to specific facts that would lead it to this conclusion, even if the conclusion was the basis for termination. It is Petitioner's argument that the ADA – like Title VII – was enacted to combat discrimination in the workplace. There exists an abundance of evidence that could allow a jury to infer Respondent regarded Petitioner as disabled per the ADA, but this decision takes that opportunity away from the trier of fact. Guidance is needed by the Court as to what evidence (if any, if the Court concludes there is direct evidence of discrimination) is necessary to defeat a similar motion for summary judgment. As it stands, *Tockes* effectively precludes any "regarded as disabled" claim to go forward without overwhelming evidence showing the employer believed the employee was substantially limited in a major life activity. It also allows an employer to tell an employee he or she is being terminated because the employee is "crippled, handicapped and disabled". Ultimately, employers will be able to harbor and articulate the stereotypes with virtual impunity. This is particularly evident when one compares this case to a similar hypothetical Title VII case,[3] in which case liability would be clear because the statements would constitute direct evidence of illegal discrimination.

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[3] A hypothetical, similar Title VII claim would be "your termination is partly our fault because we hired a woman in the first place." The instant case would be even more severe because a derogatory term was used as a basis for termination.

D. Overturning *Tockes* will not discourage employers from hiring qualified individuals with disabilities.

The Seventh Circuit Court of Appeals expressed concern that allowing Petitioner to go forward would discourage employers from hiring individuals with impairments (App. 3-4). This is untrue. *Tockes* is a wrongful termination case, not a failure to hire lawsuit. The issue is not what Respondent believed when it hired Petitioner, but its belief at the time it terminated him. (See *Laws v. Pact, Inc.*, 2000 US Dist. LEXIS 8473, 8479-8484 (ND Ill. 2000) holding that the relevant inquiry is what the employer knew at the time of termination).

Respondent learned the specifics of Petitioner's disability after he was hired. The final straw was when Petitioner allegedly[4] used one hand to perform a specific job duty. As it stands, *Tockes* allows an employer who learns of a disability after hiring to legally terminate the individual. As to the Court of Appeals' concern that a different result would discourage employers from hiring individuals with physical limitations, if an employer hires such a person, and it turns out that the employee cannot perform the essential functions of the job, the employer is protected by the statute; an individual who cannot perform the essential functions of the job is not a qualified individual with a disability (42 U.S.C. §12112(a)).

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[4] The facts of the incident are disputed by the parties (App. 1-4).

CONCLUSION

This case presents questions of exceptional importance. First, what evidence is necessary when an employer articulates a disability as a basis for termination? Second, what underlying factual evidence is needed to prove an employer regarded an employee as disabled?

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 03-1794

ROBERT TOCKES,

Plaintiff-Appellant,

v.

AIR-LAND TRANSPORT SERVICES, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 01-1405 – **Joe Billy McDade**, *Chief Judge.*

ARGUED AUGUST 6, 2003 – DECIDED SEPTEMBER 9, 2003

Before BAUER, POSNER, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* Robert Tockes' suit for disability discrimination by his former employer was dismissed on summary judgment. In 1988 Tockes, who was then in the Army, had injured his right hand. The nature of the injury is unclear. The only description comes from Tockes, who describes it as "a crushing injury" when his hand was caught between two vehicles, resulting in "permanent restrictions" on the use of his hand. He does not say what those restrictions are, but the injury was serious enough to induce the Army to award him a 20 percent disability pension. The injury clearly was not disabling within the

meaning of the Americans with Disabilities Act, however, as it did not prevent him from working at jobs that require two hands, such as driving a truck that has not been adapted for a disabled person. And indeed he was hired by the defendant as a flatbed-truck driver in 2001 after informing the defendant of his injury and being put through a full road test and physical examination. One month later he was fired, after the defendant discovered that he had used only one hand in fastening a load to the bed of the truck, in violation of the company's safety rules; it is extremely dangerous to fasten a load on a flatbed truck insecurely. Oddly, there is no indication whether it was Tockes' "good," his left, hand that he was using to fasten the load.

He contends, and for purposes of the appeal we accept, that when he was fired the defendant told him the following three things: he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person. He argues that these statements show that the company violated the provision of the ADA that creates a remedy for a worker who suffers an adverse personnel action because, though he is not disabled within the meaning of the Act, his employer thinks he is. 42 U.S.C. § 12102(2)(C); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489-90 (1999); *Dyke v. O'Neal Steel, Inc.*, 327 F.3d 628, 632-33 (7th Cir. 2003). The provision penalizes false beliefs about disability in an effort to dispel them, on the theory that such beliefs work to the detriment of the (truly) disabled. *Sutton v. United Air Lines, Inc., supra,* 527 U.S. at 489-90; *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 573 (7th Cir. 2001). What defeats Tockes' suit is that there is no evidence that his employer harbored the erroneous belief that he was

disabled *within the meaning of the Act*. (Obviously it knew he had a disability.) For one thing, had it thought that, it would have been unlikely to hire him to drive a flatbed truck, at least without altering the controls so that he would not have to operate the manual gearshift with his damaged right hand. A "false belief" case is more plausible when a worker who was fine when he was hired experiences some illness or injury that his employer mistakenly considers disabling.

It is true that if Tockes is believed, the defendant called him "crippled" and "disabled" and "handicapped," but all are words with a range of meanings, and do not without more connote a belief that the individual is under the protection of the ADA. The Army thought Tockes 20 percent disabled; obviously this does not mean that it thought him so far disabled as to fall within the restrictive meaning that the ADA assigns to the term. To be disabled within that meaning, Tockes would have had to be unable to drive without some accommodation to his disability. Unless the employer mistakenly believes that an employee has a disability grave enough to be so classified under the ADA, the employer's acting on the mistaken belief does not violate the statute. *Wright v. Illinois Dep't of Corrections,* 204 F.3d 727, 731-32 (7th Cir. 2000); *Bailey v. Georgia-Pacific Corp.,* 306 F.3d 1162, 1169-70 (1st Cir. 2002).

Allowing this suit to go forward would merely discourage employers from giving a chance for employment to workers who have some degree of disability. Loading and driving a flatbed truck is strenuous work, and so a partially disabled person would be bound to have an above-average probability of failing at it. If the probability materializes, as it may or may not have done in this case

(remember that we don't know which hand Tockes used in fastening the load), and the company blames both itself and the partial disability for the failure, there is no reason to ascribe a discriminatory motive to the employer.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ROBERT TOCKES,	)	
Plaintiff,	)	
v.	)	**Case No. 01-1405**
AIR-LAND TRANSPORT SERVICES, INC.	)	
Defendant.	)	

ORDER

(Filed Feb. 10, 2003)

This matter is before the Court on Defendant's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 and Local Rule 7.1(D) of Plaintiff's Complaint alleging violations of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Additionally, Defendant makes a Motion to Strike Plaintiff's Response for failure to comply with the requirements of Local Rule 7.1(D)(2)(a)-(d) governing responses to summary judgment motions. For the following reasons, the Court denies Defendant's Motion to Strike, but grants Defendant's Motion for Summary Judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 1988, while serving in the military, the Plaintiff, Robert Tockes, ("Tockes"), suffered an injury to his right hand when it was crushed between two vehicles. Upon discharge, Tockes received a 20% disability pension from the United States Army as a result of this injury. After his discharge, Tockes held several jobs, most notably among these were as an EMT and as a driver for various

businesses. From 1989, except for brief periods or while furthering his education, Tockes admits to being continuously and gainfully employed. Additionally, approximately two weeks after his termination from Defendant, Air-Land Transport Services, Inc., ("Air-Land"), and after a short period working as a driver for another company, Tockes was hired by Cox Transfer as a driver, a position he still currently holds.

The origins of this lawsuit date to January 2, 2001, when Tockes applied and was hired for a driving position with air-Land. Tockes contends he was hired exclusively to drive vans and would not be required to drive flatbed trucks, while Air-Land states that all drivers were hired with the expectation that they would be able to drive all types of vehicles, which at the time included vans, flatbeds and curtain [sic] trucks. At the time of his hiring Tockes states that he informed Bruce Crawford, ("Crawford"), the Operations Manager for Air-Land and the individual responsible for Tockes' hiring, of his physical impairment both verbally and in writing by providing him with a copy of a letter from the U.S. Department of Veterans Affairs indicating he was the recipient of a 20% disability pension as a result of his injury. Tockes also states he told Crawford that Air-Land may be eligible for a tax rebate if Tockes was hired because he was a disabled veteran. Finally, Tockes alleges Air-Land was on notice of his disability because he filled out an employee income certification form indicating he was disabled.

Conversely, Crawford states he was unaware until after Tockes' termination that Tockes suffered an injury to his right hand during his military service or even that he had ever been in the military. Additionally, Tockes' application for employment fails to allude to any impairment or

disability, and Air-Land never applied for a tax credit or any other form of recognition as a result of hiring Tockes. Further, Air-Land did not have any record of a letter from the Department of Veterans' affairs confirming Tockes' disability pension until receipt of such a letter dated September 17, 2002, approximately 18 months after Tockes' termination. Finally, the physical exam Air-Land requires of all drivers to ensure compliance with the Federal Motor Carrier Safety Administration – a division of the Department of Transportation – indicated Tockes had a full range of motion in his right hand and good strength in his upper extremities.

In addition, and despite his contention that he was only hired to drive vans, Tockes admits to being instructed on how to properly secure loads on flatbed trucks, including the proper way to use a ratchet and winch-bar to secure a load as part of the orientation and safety program applicable to all new drivers. This instruction included the specific admonition not to depress the winch bar below the waist, as improper use of the ratchet and winch-bar can result in the ratchet or winch-bar coming loose from the trailer lip, potentially injuring the driver. Tockes further admits that Air-Land specifically stressed the importance of maintaining a proper center of gravity when operating the ratchet and/or winch-bar to reduce the likelihood of accidents and/or injuries. Tockes also admits he was instructed that when securing a load with 4-inch straps, a bungee cord may be used to stabilize the ratchet, and that when using this bungee cord it is improper and unsafe to operate the winch-bar with only one hand. After being specifically instructed in the proper techniques for securing a ratchet, Tockes demonstrated his knowledge of the proper safety protocols by passing a written safety test as

required by Air-Land. Tockes readily acknowledges that he was aware that any failure to abide by these safety regulations could result in disciplinary action including the possibility of dismissal.

On January 31, 2000, during the probationary period applying to all new hires, Tockes suffered an injury to his back in the course of securing a load on a flatbed truck at Keystone Steel & Wire, an Air-Land customer. Tockes reported his injury to Air-Land dispatch, claiming that the injury resulted from poor or faulty equipment. Tockes' injury was treated by Dr. Matthew Setter who diagnosed Tockes with an injury to his back, specifically a lumbosacral sprain. Tockes neither contends this injury was disabling nor that it would prevent him from being able to perform his job.

Upon reporting back to Air-Land, two Air-Land employees, Darren Merrell, ("Merrell"), Air-Land's Safety Director, and Michael Minton, ("Minton"), asked Tockes to demonstrate the activity he was engaged in when his injury occurred. While the parties disagree whether Tockes violated any safety rules by using one arm or depressing the winch-bar below his waist at the time of his injury, both parties agree either action would constitute a violation of Air-Land safety procedures. However, despite contrary allegations in his legal memoranda filed with this Court, Tockes admits to using one arm at the time of his accident, stating specifically in his deposition that "while you are doing this, you can't use both hands because the ratchet will slide off, and you will go to the ground. So, you've got to do the best you can until you get it tight, then you can use both hands." When Tockes demonstrated what occurred at the time of his injury to Merrell and Minton, both men questioned the truthfulness and credibility of

Tockes' explanation that he was following proper safety procedures and that faulty equipment was to blame for the accident.

Believing Tockes to have violated safety rules during his probationary period and then attempting to conceal his violation by lying and blaming the accident on faulty equipment, Merrell recommended to Tom Daman, ("Daman"), the Vice President in charge of Operations for Air-Land and Merrell's supervisor, that Tockes be terminated pursuant to company policy. While the parties dispute whether Damon [sic] solely relied upon Merrell's recommendation, effectively serving as a rubber stamp, Damon [sic] nevertheless gave Merrell authority to terminate Tockes. Pursuant to this authority, Merrell terminated Tockes on or about February 12, 2002, with Minton serving as a witness.

Tockes has a different version of his termination, continuing to argue not only that he followed proper safety procedures and attributing his accident to faulty equipment, but also insisting he was terminated – at least in part – due [sic] his ~~a~~bility in violation of the ADA. As support, Tockes states that when Merrell informed him that he was being discharged, Merrell explicitly stated that part of the reason Tockes was being terminated was that Air-Land should not have hired a handicapped person in the first place. In what can only generously be described as an inexact recollection, Tockes alleges that Merrell used all three of the words "crippled," "handicapped," and "disabled" in this conversation, although he can remember neither the exact words nor context. For his part, Merrell denies making these statements and Minton likewise denies Merrell made any such statements. Further, at the time of Tockes' employment with Air-Land, both men deny

any knowledge that Tockes suffered from any impairment in his right hand limiting his ability to perform his job or perform any other task central to his daily life.

AIR-LAND'S MOTION TO STRIKE TOCKES' RESPONSE TO AIR-LAND'S MOTION FOR SUMMARY JUDGMENT

After Tockes filed his response to Air-Land's Motion for Summary Judgment, Air-Land moved to strike Tockes' response for failure to comply with the requirements of Local Rule 7.1(D)(2) governing the form and substance of such responses. As a preliminary matter, the Court notes that Tockes' response to Air-Land's Motion to Strike makes it clear that Tockes disadvantages his position by referencing and laboring under an old version of the Local Rules. Whether as a direct result or not, Tockes' response minimally contains the substantive material envisioned by Local Rule 7.1(D)(2), but strays significantly from the form outlined by the Local Rule. Consequently, both the opposing part and this Court must spend additional time and effort sifting through Tockes' filings to locate pertinent information.

Citing *Waldridge v American Hoechist Corp.*, 24 F.3d 918 (7th Cir. 1994), Air-Land urges this Court to find that Tockes' failure to adhere to the express requirements of Local Rule 7.1(D)(2) warrants a mandatory striking of his response, which would effectively admit Air-Land's statement of facts as uncontested, allowing Air-Land to prevail on their motion. Specifically, Air-Land objects to Tockes' perceived failure to present the substance of his response to allegedly undisputed material facts and his failure to summarize the applicable law relied upon in opposition to summary judgment. While in *Waldridge* the Seventh

Circuit upheld a district court's decision to grant a summary judgment motion based upon the non-moving party's failure to comply with a local rule governing such responses, this decision was primarily based not on the improper form of the non-moving party's response, but rather upon a lack of substance as the non-moving party failed to create a genuine issue of material fact through noncompliance with the form outlined by the local rules. *Id.* at 922. In contrast, while stretching the parameters of the Local Rules, Tockes' failure to comply with Local Rule 7.1(D)(2) is one more of form than substance.

Because this Court can refer to Tockes' Response to Defendant's Statement of Undisputed Material Facts, the Court does not have to entirely resort to combing depositions and affidavits – as would have been required by the district court in *Waldridge* – in order to discern Tockes' view of the contested facts. *See Id.* at 924. This information forms the basis of what is required in response to a Fed.R.Civ.P. 56 motion for summary judgment and the information Local Rule 7.1(D)(2) attempts to elicit, albeit in a form not properly followed by Tockes. While neither condoning Tockes' failure to conform his response to Local Rule 7.1(D)(2) nor sanctioning any future deviations from this Rule by any future party appearing before this Court, if this Court invariably struck all pleadings that failed to conform to the exact requirements of the Local Rules regardless of substance, the wheels of justice would no doubt grind to a screeching halt. Besides upholding a district court's authority to require strict compliance with their local rules, the Seventh Circuit decision in *Waldridge* also supports this Court's decision not to strike Tockes' response for failing to comply with Local Rule 7.1(D)(2) acknowledging the considerable deference to be accorded a

district court in the interpretation of its own rules. *Id.* at 923 n.4.

AIR-LAND'S MOTION FOR SUMMARY JUDGMENT

When considering a motion for summary judgment pursuant to Fed.R.Civ.P. 56, "the court must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence. The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court." *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 135 (2000) (citations omitted). Thus, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is not a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Further, Fed.R.Civ.P. 56 requires granting summary judgment when a non-moving party "fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Id.* "In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. Thus, "the district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. The court has one task, and one task only: to decide, based on the evidence of record,

whether there is any dispute of material fact that requires a trial." *Waldridge* 24 F.3d at 920.

DISCUSSION

Title I of the ADA provides "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, *or discharge of employees*, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis added). Title I goes on to define "discriminate" as :

> Participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs).

42 U.S.C. § 12112(b)(2). "Disability" with respect to an individual means a "physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Accordingly, to fall within this definition one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C))." *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 478 (1999) *referring to* 42 U.S.C. § 12111(8). This definition creates a two prong test for

determining whether a person suffers from an ADA recognized disability. First, the individual must have a physical or mental impairment, and second, that impairment must substantially limit one or more of the individuals' major life activities.

In order to survive Air-Land's motion for summary judgment, Tockes must demonstrate that he is a qualified person with a disability as defined by the ADA. *Harrington v. Rice Lake Weighing Sys., Inc.*, 122 F.3d 456, 459 (7th Cir. 1997). Because Tockes does not allege he possesses a mental impairment, he must demonstrate a physical impairment. As defined by the EEOC, a physical impairment includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal . . . " 29 C.F.R. § 1630.2(h)(1). In demonstrating a physical impairment, Tockes relies entirely upon the injury to his hand he sustained while serving in the military.

While Tockes received and passed a physical examination that indicated he had a full range of motion and good strength in his upper extremities as required by federal regulations governing commercial motor vehicle operators, Air-Land does not contest Tockes suffers from a physical impairment.[1] Because passing a physical exam to drive a

[1] The physical exam is required by the Federal Motor Carrier Safety Administration and provides in part, "[a] person is physically qualified to drive a commercial motor vehicle if that person . . . [h]as no impairment of: (i) A hand or finger which interferes with prehension or power grasping . . . " 49 C.F.R. § 391.41(b)(2). When examining a driver, physicians are instructed to note any loss or impairment of hands or fingers and to specifically note "any deformities, atrophy, paralysis,

(Continued on following page)

commercial vehicle will clearly be more narrowly tailored in its assessment of physical impairment than the broader definition evidenced by the U.S. Military's grant of a disability pension to Tockes, this Court assumes Tockes has met the threshold requirement of demonstrating a physical impairment.

Simply establishing a physical impairment is not enough to prove disability under the ADA, however. Tockes must also demonstrate that he is limited in a major life activity. "The term 'substantially limits' means, among other things, '[u]nable to perform a major life activity that the average person in the general population can perform'; or '[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.'" *Sutton*, 527 U.S. at 480 *citing* 29 C.F.R. § 1630.2(j); *see also, Furnish v. SVI Systems, Inc.*, 270 F.3d 445, 450 (7th Cir. 2001). "Finally, '[m]ajor [l]ife activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Sutton*, 527 U.S. at 480 *citing*

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partial paralysis, clubbing, edema, or hypotonia. If a hand or finger deformity exists, determine whether prehension and power grasp are sufficient to enable the driver to maintain steering wheel grip and to control other vehicle equipment during routine and emergency driving operations." 49 C.F.R. § 391.43(f). The physician is instructed to note any loss or impairment to an extremity "which may interfere with the driver's ability to operate a commercial motor vehicle safely . . . " *Id.*

29 C.F.R. § 1630.2(j).[2] While this list is intended to be illustrative, rather than exhaustive, *see Sinkler v. Midwest Property Management Limited Partnership*, 209 F.3d 678, 684 (7th Cir. 2000), the Supreme Court has held that for an individual's impairment to be substantially limiting, the impairment must prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S.Ct. 681, 691 (2002); *see also, Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) (a major life activity is something that is "integral to one's daily existence"). While whether or not an impairment is substantially limiting must be viewed in the context of the average person in the general population, whether or not a person has a disability remains an individualized inquiry. *Sutton*, 527 U.S. at 483.

Tockes' list of limitations all fail to establish that he is substantially limited in any major life activity. Several of Tockes' proffered limitations fall into the general category

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[2] It is worth noting that the Supreme Court continues to pass on the degree of deference to accord EEOC interpretations of the term "disability," noting that no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA. *See, Sutton*, 527 U.S. at 479; *Toyota Motor*, 122 S.Ct. at 689-90. Of course, while not binding, EEOC guidelines "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986); *see also, O'Neal v. City of New Albany*, 293 F.3d 998, 1009 (7th Cir. 2002). However, as in all Supreme Court decisions acknowledging the unsettled question of the degree of deference to accord EEOC guidance, neither party in the instant action challenges the validity of the regulations, so this question need not be addressed.

of caring for himself. As alleged, these limitations consist of difficulty tying his shoe, wearing a watch, or buttoning the top button of his shirt. Nonetheless, Tockes demonstrates a remarkable ability to overcome all of the limitations he identifies in his ability to care for himself, while lacking any difficulty in performing such tasks as shopping, showering, cleaning himself, or driving.[3] Insomuch as these mitigating measures correct Tockes' physical impairments, he cannot be considered substantially limited in the major life activity of caring for himself. *Sutton*, 527 U.S. at 482-83, 488.

Tockes also alleges difficulty performing certain manual tasks such as opening jars, taking notes/writing, typing, working on his car, and baiting a fishhook. Again, he has often mitigated the difficulty he has with these tasks by using fishing lures instead of worms and using various devices and tools, such as when he works on his car. Tockes also admits to being able to write and type, although slower and with greater effort, or, as in the case of taking notes, aided by a tape recorder. Put simply, Tockes fails to allege any manual task that he cannot perform, with or without accommodation, of central

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[3] Tockes never says he cannot tie his shoes, only that he has difficulty, and, as a result, his shoes end up being "sloppily" tied and not tight. Overcoming his problem of wearing a watch because of a difficulty working the clasp is overcome by simply wearing the watch on his right wrist. As for buttoning the top button of his shirt when he occasionally wants to wear a tie, the Supreme Court has previously held that needing occasional help in dressing oneself does not qualify as being substantially limited in a major life activity. *Toyota Motor*, 122 S.Ct. at 694.

importance to the average person's life that amounts to a substantial life activity.

Finally, Tockes states he is limited in his ability to work by making general statements about his inability to make a fist, his sensitivity to the cold, requiring special tools to perform his job, and listing several jobs that he cannot perform. Being "substantially limited" in the major life activity of working requires that a person be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i).

Although the Supreme court has declined to rule on whether working constitutes a major life activity, even going so far as to question its applicability, the Seventh Circuit has held that working constitutes a major life activity. *See, Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000); *Sutton*, 527 U.S. at 492. For its part, the EEOC recommends that working be viewed as a residual life activity only in disability determinations under the ADA if the individual is not substantially limited with respect to any other major life activity. *Sutton*, 527 U.S. at 492 *citing* 29 C.F.R. § 1630.2(j). Addressing claims of limitation in the major life activity of working, the Seventh Circuit has held that "an inability to perform a particular job for a particular employer" is not sufficient to establish a substantial limitation on the ability to work, instead, "the impairment must substantially limit employment generally." *Byrne v. Board of Educ., Sch. of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir.1992).

Tockes states he is unable to substantially perform the following jobs and/or tasks: a firefighter, a police

officer, a surgeon, a carpenter, a mechanic, any outdoor jobs in cold weather for more than 20 or 30 minutes, or any job involving writing more than two paragraphs, making a fist, or moving objects such as furniture. Despite these arguments, the Court notes that at no time has Tockes had difficulty obtaining work from 1989 up until his present employment with Cox Transport. The fact that Tockes is working has never even demonstrated difficulty in getting a job is sufficient evidence to defeat his claim that he is substantially limited in the major life activity of working. *Heimann v. Roadway Express, Inc.*, 228 F.Supp.2d 886, 903 (N.D.Ill. 2002) *citing Puoci v. City of Chicago*, 81 F.Supp.2d 893, 897 n.2 (N.D.Ill. 2000); *Sinkler v. Midwest Prop. Mgmt. Ltd. Pshp.*, 209 F.3d 678, 685-86 (7th Cir.2000); *Moore v. J.B. Hunt Transp., Inc.*, 221 F.3d 944, 953 (7th Cir.2000). There is no evidence in the record or in Tockes' own deposition testimony that he is significantly restricted either in his ability to perform either a class of jobs or a broad range of jobs when compared to the average person having similar training, skills, and abilities, making him unable to establish he is actually disabled under the ADA.

Having found that Tockes does not possess an actual disability, the Court now turns to the issue of whether he possesses a record of such disability or was regarded as having such a disability in order to afford him protection under the ADA. The EEOC states that the intent of this "record" definition of "disability" is to ensure that people are not discriminated against because of a history of disability or because they have been misclassified as disabled. 29 C.F.R. § 1630.2(k). To qualify, any record relied upon by the plaintiff "must . . . contain a history of, or a misclassification as having, a mental or physical

impairment that 'substantially limits one or more major life activities.'" *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1457 (7th Cir.1995) *quoting* 29 C.F.R. § 1630.2(k).

While the EEOC suggests many records could fulfill this requirement, a plaintiff fails to establish a claim for discrimination based upon a record if the record does not describe the substantial limitations of a major life activity. *See*, 29 C.F.R. § 1630.2(k); *Roth*, 57 F.3d at 1457. The records Tockes proffers as evidence of his disability consist of a letter from the Department of Veterans Affairs classifying him as 20% disabled as a result of his hand injury, his application with Air-Land, and an employee income certification letter indicating his disability.

A Pennsylvania district court addressed a highly similar situation in *Howell v. Sam's Club #8160*, 959 F.Supp. 260, 267-268 (E.D.Pa. 1997). The plaintiff in *Howell* argued that the combination of his letter from the Veterans' Administration stating he had a twenty percent disability, a tax document that he filled out while working for Sam's Club, the award Sam's Club received for hiring a disabled veteran, and his Disabled American Veteran license plate were sufficient to create a genuine issue of material fact as to whether Howell established a record of impairment. Disagreeing, the *Howell* Court found that a record indicating a disability under a statute, regulation, or program other than the ADA does not translate into a disability under the ADA without a showing of a substantial limitation in a major life activity. In order to proceed under the "record of impairment" prong of the ADA, Tockes must show both that he suffered limitation in a major life activity in the past and that Air-Land relied on the record of that impairment when dismissing him. *See*, 29 C.F.R. § 1630.2(k); *see also*, *Davidson v. Midelfort*

Clinic, Ltd., 133 F.3d 499, 510 n.7 & n.8 (7th Cir.1998). As in *Howell*, because the records relied upon by Tockes neither demonstrate a substantial impairment in a major life activity nor demonstrate Air-Land relied on such records, this Court cannot find Tockes has met his burden of establishing a record of disability satisfying the requirements of the ADA.[4]

Finally, Tockes contends that even if he was not substantially limited in a major life activity by virtue of his physical impairment, and cannot demonstrate a record indicating as much, he fulfills the ADA definition of "disabled" by being "regarded as" disabled by Air-Land. An individual may be "regarded as disabled" under this last definition of "disability" if the plaintiff demonstrates: 1) A covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or 2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. 29 C.F.R. § 1630.2(1); *Sutton*, 527 U.S. at 489; *Mack v. Great Dane Trailers*, 308 F.3d 776, 780 (7th Cir.2002). Under either formulation, Tockes must show that Air-Land entertains

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[4] In fact, without relying entirely upon his own deposition, Tockes is unable to demonstrate Air-Land had any record of his physical impairment beyond the possibility of an employee income certification form. Besides Air-Land's physical examination demonstrating that he did not suffer from any physical impairment as far as commercial driving was concerned, the depositions of all Air-Land employees demonstrate no employee was aware of any physical impairment Tockes may have possessed that would either have substantially limited a major life activity or Tockes' ability to perform his job, nor had any other record indicating any physical impairment.

misperceptions that he is "substantially limited" in a major life activity. *Sutton*, 527 U.S. at 489.

In support of his position, Tockes states that Air-Land knew of his disability because he informed them both by indicating his impairment on his application form and providing them with a copy of a letter from the Department of Veteran's Affairs indicating his receipt of a 20% disability pension. Tockes also indicated he mentioned his impairment to various, yet anonymous, employees of Air-Land as well as during his interview at the time of his hiring. Primarily, however, Tockes maintains that the statements of Darren Merrell referring to him as "crippled," "disabled," and "handicapped" at the time of his discharge evidence that Air-Land regarded Tockes as possessing a physical impairment, and that this belief formed the basis of his termination.

First, the court notes that there is no evidence in the record that Tockes indicated his impairment on his Air-Land application. Second, this Court has already established that a 20% disability pension, an income certification statement, and unspecified comments to nameless employees of Air-Land are insufficient to establish disability under the ADA unaccompanied by evidence that such impairment substantially limits a major life activity or Air-Land perceived such a limitation – evidence Tockes fails to supply. As a result, Tockes' argument that Air-Land regarded him as possessing a physical impairment that substantially limited him in a major life activity hinges upon the statements attributed to Merrell.

Based upon Tockes own self-serving statements in the record, it is possible a trier of fact could find that Merrell considered Tockes physically impaired. However, weighing

against Tockes' statements and this finding is medical evidence from Dr. Setter that Tockes had a full range of motion and good strength in his right hand; the deposition testimony of both Merrell and Minton; and an absence of any record that Tockes requested accommodation in the performance of his job, any record of Air-Land providing such accommodation, and the absence of any record in the possession of Air-Land indicating Tockes' physical impairment with the exception of a letter from the Department of Veterans Affairs received 18 months after Tockes' termination. Nonetheless, this Court must consider this evidence most favorable to Tockes as the nonmoving party and assume that Air-Land – and Merrell in particular – regarded Tockes as possessing a physical impairment.

However, due to the lack of substantive evidence corroborating Tockes' self-serving statements, no reasonable juror could find that Tockes alleges facts sufficient to demonstrate Air-Land perceived his physical impairment as substantially limited in any major life activity. Again relying primarily on the statements attributed to Merrell, Tockes attempts to meet his burden by arguing that Air-Land perceived him to be substantially limited in any major life activity involving the use of a hand, going so far as to contend Air-Land viewed him as essentially having the use of only one limb, and then more specifically contending Air-Land believed he was substantially limited in his ability to work. Beyond his own deposition testimony, he offers absolutely no facts to support this contention.

Air-Land clearly believed he could perform the job for which he was hired or they never would have hired him in the first place. He passed the required physical with flying colors as well as all other required tests. Air-Land possessed no written record of Tockes' physical impairment

except for the possibility of an employee income certification form, a copy of which was not provided to the court. The letter from the Department of Veterans' Affairs Tockes contends he provided Air-Land when he was hired was also missing from Air-Land's records until such a letter was received 18 months after Tockes' termination.[5] In light of the consistent history of employment Tockes listed on his application performing the very duties Air-Land required for the position they hired him for, Air-Land had no reason to believe Tockes was substantially limited in his ability to work or even his specific ability to perform the requirements of the Air-Land position. *See*, *Heimann v. Roadway Express, Inc.*, 228 F.Supp.2d 886, 903 (N.D.Ill. 2002). Further, Tockes admitted he could not remember ever discussing limitations on non-work related activities with any Air-Land employees. Finally, assuming *arguendo*, that even if after hiring Tockes Air-Land decided that they incorrectly determined he could perform the duties of his job, this would be insufficient to establish Air-Land considered Tockes substantially limited in the major life activity of working. *See*, *Toyota Motor*, 122 S.Ct at 693 (An inability to perform manual or occupation-specific tasks does not necessarily show an inability to perform the central functions of daily life); *see also*, *Mack*, 308 F.3d at 780 ("An impairment that interferes with work-related tasks, however, does not necessarily rise to the level of a disability within the meaning of the ADA."); *Byrne*, 979 F.2d at 565 (The Seventh Circuit has held that

[5] In fact, Tockes' own filings with this Court incorporate the letter dated September 17, 2002, rather than one bearing an earlier date more in compliance with Tockes' version of the facts.

"an inability to perform a particular job for a particular employer" is not sufficient to establish a substantial limitation on the ability to work, instead, "the impairment must substantially limit employment generally.")

Fed.R.Civ.P 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A plaintiff cannot rest on mere allegations of a claim without any significant probative evidence to support his complaint. *Id.*; *Beard v. Whitley County REMC*, 840 F.2d 405, 410 (7th Cir.1988). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses . . . " *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-4 (1986). Therefore, the non-moving party is required to go beyond the pleadings, affidavits, depositions, answers to interrogatories and admissions on file to designate specific facts showing a genuine issue for trial. *See Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1991). Clearly, Tockes has not done this, and granting Air-Land's Summary Judgment motion is required.

Having found that Tockes is not a qualified individual with a disability, had no record of such disability, nor could reasonably be believed to have been regarded as having such a disability, his discharge is not covered by the ADA because employers do not run afoul of the ADA even if they take adverse employment actions based on

physical impairments that are "limiting, but not substantially limiting" such that they do not rise to the level of a disability under the ADA's definition. *Sutton*, 527 U.S. at 490-491. As a result, Air-Land's motion for summary judgment will be granted.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant's Motion to strike Tockes' Response to Air-Land's Motion for Summary Judgment is DENIED. However, Defendant's Motion for Summary Judgment is GRANTED.

CASE TERMINATED.

ENTERED this 10th day of February, 2003.

/s/ Joe B. McDade
JOE BILLY McDADE
Chief United States District Judge